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Nos. 84-28 and 84-143

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In The

# Supreme Court of the United States

October Term, 1984

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No. 84-28

DONALD C. BROCKETT,
Spokane County Prosecuting Attorney
*Appellant,*

vs.

SPOKANE ARCADES, INC., et al.,
*Appellees,*

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No. 84-143

KENNETH EIKENBERRY,
Attorney General for the State of Washington, et al.,
*Appellants,*

vs.

J-R DISTRIBUTORS, INC., et al.,
*Appellees,*

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On Appeal From The United States
Court Of Appeals For The Ninth Circuit

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## BRIEF OF AMICI CURIAE, CITIZENS FOR DECENCY THROUGH LAW, INC., AND CHARLES H KEATING, JR., IN SUPPORT OF APPELLANTS AND MOTION FOR LEAVE TO FILE

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PAUL C. McCOMMON, III
Citizens for Decency through Law
2331 W. Royal Palm Rd. #105
Phoenix, Arizona 85021
(602) 995-2600
*Counsel of Record*
*For Amici Curiae*

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On Appeal From The United States
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## MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CITIZENS FOR DECENCY THROUGH LAW, INC. AND CHARLES H KEATING, JR. IN SUPPORT OF APPELLANTS

Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this

Honorable United States Supreme Court, pursuant to Court Rule 36, for leave to file a brief as Amici Curiae in support of Appellants. Consent was granted by Appellants and was not granted by Appellees.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty-five years in the enforcement of laws regulating and combatting the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the

United States. Citizens for Decency through Law, Inc. (CDL), is a non-profit, non-sectarian, and non-political organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assistance to prosecutors and law enforcement personnel.

Moving Party was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in

obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in the "Report of Charles H Keating, Jr., Commissioner", which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by CDL's Honorary Committee membership of hundreds of past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of obscenity laws is evidenced by his having been plaintiff on behalf of the state of Ohio in an obscenity nuisance abatement action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel. Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

Moving Party and CDL have filed numerous briefs amicus curiae in this Court urging that obscenity laws or convictions be upheld including: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 11 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31 (1966); Mishkin

v. New York, 383 U.S. 502, 16 L.Ed.2d 56 (1966); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 447 (1973); Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745 (1973); Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980); and New York v. Ferber, ___U.S.___, 73 L.Ed.2d 1113 (1982).

CDL staff attorneys have prosecuted literally hundreds of successful obscenity cases in states across this country, and they advise government attorneys and law enforcement personnel on a daily basis on matters relating to the preparation, trial, and appeal of obscenity and child pornography cases. Because of this practical experience in

dealing nationally with the application and interpretation of obscenity legislation, Amici are well-qualified to present facts relating to the "in-court" application of Washington's obscenity law which will probably not be presented to this Court by the parties themselves.

Moving parties hope to demonstrate that the definition of "prurient" in the Washington law is constitutional in all respects, and that lower court rulings and interpretations have twisted the meaning of the term to such an extent that law enforcement efforts nationally are severely threatened. Amici further hope to urge that this Court's approval of the Washington definition of "prurient" will result in more logical and consistent enforcement of obscenity and child pornography laws in harmony with the prior decisions of this Court. Moving parties submit that the practical

application of this definition of "prurient" is important to the Court and will be relevant to the disposition of this case.

It is sincerely hoped that this Court will grant our Motion for Leave to File a Brief as Amici Curiae and allow us to participate in this important case which presents important issues for all the people of the United States as well as those of the State of Washington.

Respectfully submitted,

CITIZENS FOR DECENCY
THROUGH LAW, INC.
and
CHARLES H KEATING, JR.

By: Paul C. McCommon III

PAUL C. McCOMMON III
Legal Counsel
Citizens for Decency
through Law, Inc.
Suite 105
2331 W. Royal Palm Road
Phoenix, Arizona 85021
(602) 995-2600

Counsel for Moving Parties

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## BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

## PROPOSITION OF LAW

THE DEFINITION OF "PRURIENT" IN THE OBSCENITY STATUTE OF THE STATE OF WASHINGTON IS A PROPER AND CONSTITUTIONAL DEFINITION WHICH IS SUPPORTED BY ALL PRIOR DECISIONS OF THIS COURT.

## SUMMARY OF ARGUMENT

The restrictive definition of "prurient" urged by Appellees has resulted nationally in misinterpretations and misapplications of obscenity legislation. Through this misapplication of the law and by the misuse of expert testimony, defense counsel and lower courts have applied the "prurient interest" test so that material becomes less obscene as it becomes more sexually explicit, deviant, bizarre, and degrading. Such an interpretation is inconsistent with the prior decisions and intent of this Court.

The definition of "prurient" in the obscenity statute of the State of Washington is proper and is supported by all prior decisions of this Court. By reaffirming the Washington definition, this Court will end the misapplication of the "prurient interest" test, and will

ensure more consistent and vigorous enforcement of federal and state obscenity laws.

## LAW AND ARGUMENT

### A. THE ISSUE RELATING TO A PROPER AND CONSTITUTIONAL DEFINITION OF "PRURIENT" IS SO SUBSTANTIAL THAT IF THE JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS ALLOWED TO STAND, THE ENFORCEMENT OF EVERY OBSCENITY LAW IN THE COUNTRY WILL BE ADVERSELY AFFECTED.

The primary purpose for the submission of this brief is to rebut the argument made by Appellees to this Court in their Motion to Dismiss or Affirm that the definition of "prurient" in the Washington state obscenity code involves an insubstantial issue. Appellees argue that because this is an insubstantial issue, the appeal should be dismissed. Contrary to the argument of Appellees, this is an issue of such importance that the enforcement of every obscenity law in

the country will be adversely affected if the ruling the Court of Appeals is allowed to stand.

Amici is fearful that the debate in this Court will take place without a serious presentation of the way in which this definition of "prurient" affects obscenity trial prosecution and defense strategy. Amici will demonstrate the manner in which the "prurient interest" test has become central to defense strategy in obscenity trials, and why permitting a definition of prurient other than "shameful or morbid" would eliminate an often-successful strategy used in trials across the country by defense attorneys in obscenity cases.

1. The "prurient interest" test has been misinterpreted and convoluted by attorneys and lower courts to such an extent that in its application, material can become less "prurient", and therefore less obscene, as it becomes more sexually explicit and deviant.

The "prurient interest" test is central to obscenity law and is usually the most vigorously contested point between government attorneys and those engaged in the business of pornography wherever in the country an obscenity trial takes place. This Court, Amici submits, made clear in Roth v. United States, 354 U.S. 476, 487 n.20 (1957); Mishkin v. New York, 383 U.S. 502, 508 (1966); and Miller v. California, 413 U.S. 15, 30 (1973), that prurience is a legal term of art meaning a "lustful", "erotic", "lewd", "lascivious", or "shameful or morbid" type of sexual interest which must be found to be the predominant or "as a whole" appeal or direction of an obscene book or film. In all respects, Amici supports and reaffirms the argument of Appellants that defining "prurient" as "that which incites lasciviousness or lust" is a

constitutionally acceptable definition of "prurient" which is supported by numerous decisions of this Court. Appellants have and will adequately discuss the legal authority for the Washington definition of the term "prurient." Amici will, therefore, discuss in detail the significance of these definitions and the reasons why attorneys for this industry are fighting the Washington definition with such fervor.[1]

It would seem logical in reading the decisions of this Court that in applying the tests of obscenity, a film, magazine, or other item would become more obscene and illegal as it becomes more sexually explicit and/or deviant. In the Mishkin

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[1] See, Goldstein v. Allain, 568 F.Supp. 1377 (N.D. Miss. 1983), where the attorney of record for Appellees was successful at the District Court level in enjoining the enforcement of the Mississippi obscenity statute which defines "prurient interest" as "a lustful, erotic, shameful, or morbid interest in nudity, sex or excretion."

case, 383 U.S. at 508, it was argued that books involved in that case which depicted various deviant sexual practices such as flagellation, fetishism, and lesbianism did not satisfy the prurient appeal test because they did not appeal to a prurient interest of the "average person" in sex, and that instead of "stimulating the erotic, they disgust and sicken." This Court quickly rejected this absurd argument "as being founded on an unrealistic interpretation of the prurient-appeal requirement." However, the ruling in the Mishkin case has not deterred creative defense attorneys in obscenity cases from making this same or similar argument in cases since 1966 and up to the present time.

In an article by a leading obscenity defense lawyer, it is explained how this interpretation of the "prurient interest" test, which was rejected by this Court in

Mishkin, can be used successfully to defend even the most abhorrent material. In an article by Harold Price Fahringer, he states:

> The material charged with being obscene is to be judged by its impact on the normal person, not by its effects on persons who are easily influenced or sensitive.
>
> . . .
>
> Thus, if you have a work that obviously appeals to a bizarre sexual appetite, an argument can be made by the defense that it would not appeal to the average person's (or juror's) sexual desires. Consequently, an acquittal is mandated under this part of the obscenity test if the average person is unaffected by the material charged.

Fahringer, "The Defense of an Obscenity Prosecution", Trial Magazine (May, 1978).[2]

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[2] Harold Price Fahringer was the attorney for the respondent in the case of New York v. Ferber, ___U.S.___, 73 L.Ed.2d 1113 (1982), where this Court rejected the contention of Mr. Fahringer's client that child pornography could not be proscribed unless the material met the legal definition of obscenity.

Mr. Fahringer's use of this strategy in a trial situation was discussed in another article.[3] In this writer's account of a New York City trial in which Mr. Fahringer served as defense counsel, the films involved in the prosecution depicted "explicit sex acts between two male homosexuals with one of the performers committing an act of oral sodomy on a dog." Id. at 227. Mr. Cohen made the following observations in his article about Fahringer's closing argument:

> He acknowledged that the films charged against his client were the most distasteful he had ever seen. He confided to the jury that he too had difficulty looking at them during their exhibition in the courtroom. However, the defense attorney stressed that the definition of obscenity had to be carefully adhered to like

---

[3] Cohen, "Obscenity Cases: Anatomy of a Winning Defense", Criminal Law Bulletin, Vol. 14, No. 3, pp. 225-31 (May-June 1978).

> any other rule of law involved in a criminal trial.
>
> Fahringer reminded the jurors that before they could find the films obscene, they had to be convinced, beyond a reasonable doubt, that they appealed to the "average person's prurient interest in sex." . . . He stressed the point to the jurors that they were "average" people. "Prurient appeal" meant a "morbid or shameful interest in sex," and the word "interest," as defined by Webster's dictionary, meant "inducing one to engage in or participate in." He then insisted that if the films aroused them to the extent that they would be induced to participate in acts of beastiality--then they should find them obscene! If, on the other hand, they found the films so repulsive and disgusting that they were repelled by them, they should return a verdict of not guilty. With that, he concluded argument and sat down.

Id. at 229 (emphasis added). Cohen explains that the source of Mr. Fahringer's argument was the case of United States v. Roth, supra. The author of this article goes on to inform the

reader that Fahringer obtained an acquittal in this case by "turning obscenity on its head." Id. at 231. He concluded his article with the observation that obviously the more perverse or bizarre the sex depicted, the less likely it is that the definition of obscenity will be found to apply. The Court will note that this trial tactic was successful in this New York City obscenity trial 11 years after this Court ruled in Mishkin that such an argument was "founded on an unrealistic interpretation of the prurient appeal requirement." 383 U.S. at 508.

Since 1978, defense attorneys in obscenity trials continued to develop their skills in convoluting the "prurient appeal" requirement of obscenity. In a newspaper article, a writer from Fairfax, Virginia describes how another leading obscenity defense attorney used the

"prurient appeal" test to obtain acquittals in obscenity prosecutions.[4] The author of this news article described the events as follows:

> Fairfax county is losing the battle against pornography.
>
> Skillfully designed and lavishly financed defense tactics are chipping away at the county's once solid attack against sellers of adult books, like Croatan Books Inc.
>
> Until recently, county prosecutors had tallied up more than 100 indictments against the corporation for the sale of obscene magazines. From 1974 until April, 1982, the county won 84 cases bringing in $664,000 in fines from Croatan.
>
> . . .
>
> But the tide turned this past month when Croatan won eight straight cases with the aid of Baltimore attorney Burton W. Sandler, who has a national reputation for expertise in handling First Amendment obscenity cases.
>
> Calling the court's decision a "giant step for freedom of expression in Fairfax County," Sandler said his victory demonstrates that the average county

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[4] George, "Porn Peddlers Take Edge in Legal Dual", Fairfax Journal, June 16, 1982.

resident does not have a "prurient" (morbid, degrading and shameful) interest in sex when they read Croatan's adult magazines.

. . . .

Hurd said his defeat was due primarily to Croatan's "high-powered" and expensive defense, which brought in such witnesses as sexologists from California and a psychologist from Johns Hopkins University.

And it was a new defense tactic presented by Sandler that caught prosecutors, witnesses, and jurors off guard, Hurd said. . . .

But Sandler tried a new defense by cross-examining Hurd's witnesses, including the police officer who bought the magazine and a women civic leader, and asking three questions:

Are you an average person in Fairfax County? Do you have a healthy interest in sex? Do you have a shameful, morbid, or sick interest in sex?

All witnesses answered yes to the first two questions and no to the last question, Sandler said.

He then asked witnesses to read the magazines in court. After they finished he asked, "Do you have a prurient interest--an itching or longing to jump someone--after reading this material?" No one answered yes, Sandler said.

> "If that prurient interest element was not met therefore the material is not obscene. That has not been done in Fairfax County before," Sandler said.

Id. (emphasis added). The Court will notice several elements to this defense presented in these Virginia cases. First of all, the defense attorney was permitted to offer evidence through cross-examination and through defense "expert" testimony that an average person does not have a shameful or morbid interest in sex--he has only a healthy interest in sex. Therefore, he can argue that the "prurient interest" test is not met and an acquittal is mandated. He goes on to ask whether or not the material aroused interest in the witnesses to such an extent that the witnesses would have "an itching or longing to jump someone--after reading this material." This attorney thus refined the argument and tactic of

attorney Fahringer from 1978, by not only arguing that the material does not arouse interest and is therefore not obscene, but also he has successfully argued by means of paid "expert" testimony that an average person does not have a shameful, morbid, or sick interest which can be appealed to. This defense strategy has, in effect, destroyed this Court's definition of obscenity which assumed that a mythical average person would have a "prurient" interest which could be appealed to. Attorneys Sandler and Fahringer have both convoluted the Court's "prurient interest" requirement by changing it to require actual "arousal" and not an "appeal" to a "prurient" interest in sex as this Court defined the test.

In a 1981 case involving a motion picture entitled "Caligula", it can again be demonstrated how the "prurient

interest" requirement can be thoroughly twisted to avoid a determination of obscenity when the definition of "prurient" is limited to "shameful" or "morbid." Penthouse International, Ltd. v. McAuliffe, Civil Action No. C80-2172A (N.D. Ga. May 15, 1981).[5] In this case, the trial court ruled that to appeal to the "prurient interest" the material must "sexually stimulate the viewer or reader." Id., slip op. at 6 (emphasis added). The trial judge in the case was greatly impressed by the expert testimony provided by the makers of the film "Caligula." In his order, he

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[5] On appeal, a panel of the Eleventh Circuit Court of Appeals reversed in part and affirmed in part, 702 F.2d 925 (11th Cir. 1983). The Court of Appeals reheard the case en banc thus vacating the panel opinion and then proceeded to affirm the District Court opinion "by operation of law" when the en banc court split by a vote of six to six on a disposition of the case. 717 F.2d 517 (11th Cir. 1983), cert. denied, ___U.S.___, 104 S.Ct. 1615 (1984).

emphasized the testimony of Dr. Downing Tait, Jr., who testified that:

> . . . to the average person in Fulton County, the overwhelming depictions of violence, cruelty, and sexual explicitness in Caligula would not arouse erotic interest.

Id., slip op. at 7.

Another witness testified that the average person would likely find the film revolting and offensive but lacking in stimulative effect. All of this "expert" testimony convinced the judge to determine the following regarding the "prurient appeal" requirement as it related to the "hard-core" film at issue:

> The concept of prurient appeal has never been adequately defined by the Supreme Court. It is clear from the cases, however, that the presence of shocking, disgusting, or explicitly sexual scenes in a movie is insufficient to satisfy the "prurient interest" test of Miller. . . . While Caligula, taken as a whole, certainly does not appeal to a healthy or normal interest in sex, neither does

> it appeal to a prurient interest in sex. The tendency of Caligula instead is to inhibit sexual stimulation. The court finds, as did the advisory jury, that to the average person applying contemporary community standards, the film Caligula, viewed in its entirety, does not appeal to the prurient interest in sex.

Id., slip op. at 9 (emphasis added). Thus it can be seen that the producers of the film "Caligula" were successful in providing "expert" testimony that an average person would not be aroused by the depictions of sexual activity in the film "Caligula" and, therefore, the court determined that the film was so shocking, disgusting, and sexually explicit that it would not satisfy the "prurient interest" test of Miller and would, therefore, not be obscene. Soon after this Court denied certiorari in the McAuliffe case, one of the nation's newspapers commented on this decision:

> The Supreme Court yesterday agreed with the movie review offered by a lower court and decided that the film "Caligula" is so repulsive that it can't be considered obscene. The high court left intact the ruling of the lower court which said that the Bob Guccione film is not legally obscene because it does not arouse people, but repels and offends them.

Norman, "Top Court: Film too Vile to be Obscene," New York Post, March 20, 1984.

The above examples give this Court an indication as to the manner in which the "prurient interest" test has been convoluted, misinterpreted, and distorted by pornography defense attorneys and lower courts. By confining the definition of "prurient" to "shameful or morbid", defense attorneys in obscenity cases have several options available by which they can obtain acquittals. To summarize, if the material at issue in the trial is on the mild end of the spectrum in its sexual explicitness (such

as a Penthouse or Hustler magazine [6]), expert testimony can be used to demonstrate that average people do not have a "shameful or morbid" interest in sex and have only a "healthy" interest. The "expert" would then offer an opinion that these magazines appeal to a healthy and not shameful or morbid interest, and therefore an acquittal is justified. As the magazines or films become more sexually explicit and/or deviant, expert

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[6] In a case originating in Atlanta, an issue of Penthouse magazine was determined obscene in 1980 by the Court of Appeals for the Fifth Circuit. Penthouse International, Ltd., et al. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980). A jury in Atlanta found Hustler magazine to be in violation of that state's obscenity law in 1979. Flynt v. State of Georgia, 264 S.E.2d 669 (Ga. Ct. App. 1980), cert. denied, 449 U.S. 888 (1980). The Court will note that such decisions were probably aided by state appellate court decisions permitting further jury instructions in obscenity trials defining "prurient" as "material having a tendency to excite lustful thoughts." This jury instruction was taken from Roth v. United States, 354 U.S. at 487 n.20. See, Spry v. State of Georgia, 274 S.E.2d 2, 5 (Ga. Ct. App. 1980).

testimony will be used to establish that average people do not have a "shameful or morbid" interest in sex, but only a "normal or healthy" interest, and therefore would not be aroused by the material but would be offended or repulsed. As should be obvious from this analysis, it becomes easier for a defense attorney to get an acquittal in an obscenity trial as the material becomes more disgusting and degrading (such as the previously discussed beastiality movie), as long as the definition of "prurient" is restricted to a "shameful or morbid" interest in sex.

As will be shown in the next section, a definition of "prurient" as that which incites "laciviousness or lust" would remedy this ridiculous situation that has developed in the lower courts, and would further this Court's original intention that as material

becomes more explicit, it would become more obscene under the law.

2. The abuse, misinterpretation, and convolution of the "prurient interest" test can be remedied by upholding the Washington definition of "prurient" as "that which incites lasciviousness or lust."

It is an obvious distortion of this Court's intent to interpret the body of obscenity law to result in acquittals as material becomes more explicit, deviant, and bizarre. This situation resulted because of lower court interpretations that in order to be obscene, material must appeal to a shameful or morbid interest in sex and by interpretations that average people do not have such shameful or morbid interests in sex. By permitting definitions of "prurient" other than shameful or morbid, as this Court has done in its previous

decisions, this abuse of the law can be stopped. By permitting definitions of prurient in terms such as "lustful", "lewd", "lascivious", and "erotic", defense attorneys and courts will not be able to argue that the more vile the material becomes, the less obscene it becomes.

It should also be mentioned that the definition of "prurient" urged by Appellees creates an obvious contradiction between the "prurient appeal" and "patent offensiveness" prongs of the Miller test of obscenity. Under the "patent offensiveness" test, the material must, applying contemporary community standards, be patently offensive to the average person. The kinds of conduct that can be determined "patently offensive" are the "hard core" types of conduct suggested as examples by this Court in Miller (these could clearly

be "lustful", "erotic", or "lascivious" depictions of sexual conduct).[7] However, under the interpretation of Appellees and many lower federal and state courts, the material must, at the same time, appeal to or stimulate the average person under the "prurient appeal" test. This interpretation of the law is absurd, but will continue unless this Court upholds the definitions of "prurient" as written by the Washington legislature following this Court's own language. Referring back to the example given earlier where Mr. Fahringer obtained an acquittal in a trial where the "hard-core" film at issue involved "an act of oral sodomy on a dog", such a verdict would probably not have been possible if "prurient" had also been defined for the jury as a

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[7] See, Smith v. United States, 431 U.S. 291, 301 (1977).

"lascivious" or "lewd" interest in sex, and if the judge had given a "deviant" instruction pursuant to Mishkin v. New York, supra; Hamling v. United States, 418 U.S. 87 (1974); and Pinkus v. United States, 436 U.S. 293 (1978).

This Court can also remedy the abuse of this test by reaffirming its position that the test is met by determining the intended or apparent appeal of the material and not whether it actually arouses an average person, or arouses witnesses, members of the jury, or the judge of the court itself. The situation can further be remedied by stopping the abuse of expert witness testimony. It is ludicrous to allow expert witnesses to testify contrary to the law and to this Court's intent in establishing the law as they do in these cases when they testify that an average person does not have a "shameful or morbid" ("prurient")

interest in sex. Obviously, when this Court established this requirement it assumed that average people did have a broader "prurient" interest that could be appealed to (not necessarily aroused). In conclusion, by affirming the Washington definition of "prurient interest", this Court can remedy a misinterpretation of the law which has frustrated obscenity prosecutions in this country for at least the past 15 years, and can bring the prosecution of obscenity cases into uniformity with this Court's prior opinions and interpretations.

B. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ACTED IN TOTAL DISREGARD OF POLICIES OF FEDERALISM AND COMITY IN INVALIDATING THE WASHINGTON OBSCENITY LAW, WHERE STATE COURTS HAD BEEN GIVEN NO OPPORTUNITY TO CONSTRUE THE STATUTE AND WHERE FEDERAL CONSTITUTIONAL CLAIMS COULD HAVE BEEN RAISED AND CONSIDERED IN STATE COURTS AS THE LAW WAS APPLIED.

Amici fully support Appellants in their position that the courts below should have abstained from making a facial analysis of the Washington obscenity statute, and should have permitted state courts to interpret the law in a manner consistent with prior decisions of this Court.

## CONCLUSION

For these reasons, the issues presented in these cases are substantial, and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

CITIZENS FOR DECENCY
THROUGH LAW, INC.
and
CHARLES H KEATING, JR.

By: Paul C. McCommon III

PAUL C. McCOMMON III
Legal Counsel
Citizens for Decency
through Law, Inc.
Suite 105
2331 W. Royal Palm Road
Phoenix, Arizona 85021
(602) 995-2600

Counsel for Amici Curiae

## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 1984, three copies of the foregoing Motion and Brief for Amici Curiae Citizens for Decency through Law, Inc., and Charles H Keating, Jr., in Support of Appellants were sent by U.S. Mail, Postage Prepaid, to all counsel required to be served:

CHRISTINE O. GREGOIRE, ESQ.
Deputy Attorney General
Office of the Attorney General
Temple of Justice
Olympia, Washington 98504

Attorney for Appellants
Kenneth Eikenberry, James Sloane, Jeffrey C. Sullivan, Fred Andrews, and Norm Maleng

DAVID A. SARACENO, ESQ.
Deputy Prosecuting Attorney
Spokane County Prosecuting Attorney
City-County Public Safety Building
Spokane, Washington 99260

Attorney for Appellant
Donald C. Brockett

JOHN H. WESTON, ESQ.
Brown, Weston & Sarno
433 N. Camden Drive
Suite 900
Beverly Hills, California 90210

Attorney for Appellees

By: Paul C. McCommon III
PAUL C. McCOMMON III
Counsel for Amici